United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

74-1334

Original

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

- -X

BOSTON M. CHANCE, LOUIS C. MERCADO, et al.,

Plaintiffs,

-against-

No. 74-1334

THE BOARD OF EXAMINERS and THE BOARD OF EDUCATION OF THE CITY OF NEW YORK, et al.,

Defendants.

- -X

MEMORANDUM OF DEFENDANT BOARD OF EXAMINERS IN SUPPORT OF THE APPEAL BY CSA FROM AN ORDER OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

KAYE, SCHOLER, FIERMAN, HAYS & HANDLER
425 Park Avenue
New York, New York 10022
(212) 759-8400

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

- -X

BOSTON M. CHANCE, LOUIS C. MERCADO, et al.,

Plaintiffs,

-against-

THE BOARD OF EXAMINERS and THE BOARD OF EDUCATION OF THE CITY OF NEW YORK, et al.,

Defendants.

No. 74-1334

- -X

MEMORANDUM OF DEFENDANT BOARD OF EXAMINERS IN SUPPORT OF THE APPEAL BY CSA FROM AN ORDER OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

This memorandum is submitted by defendant Board of Examiners in support of the appeal by the Council of Supervisors and Administrators (CSA) from orders of the District Court for the Southern District of New York.

Briefly, the appeal involves a dispute between the plaintiffs on the one hand, and the defendant Board of Examiners and the CSA as intervenor on the other hand, regarding the interpretation of Paragraph VIII of a Final Judgment dated July 12, 1973 entered by Judge Mansfield in the Southern District. The plaintiffs contend that that paragraph abrogates the transfer provisions of the CSA agreement with the Board of Education. The defendant Board of Examiners, who negotiated the settlement

with the plaintiffs, denies that contention. The matter was argued informally before Judge Mansfield who decided in favor of the plaintiffs. Judge Tyler heard re-argument and concurred in Judge Mansfield's decision. We believe that Judge Mansfield was wrong in his original decision and that his error was perpetuated by Judge Tyler. We urge this Court to reverse the decision of the District Court.

The transfer provision of the CSA agreement (Joint Appendix p. 46a) is nothing more than a simple expression of a seniority benefit of the type frequently contained in collective bargaining agreements. The provision gives a preference, in making a transfer to other districts, to those supervisors with 5 or more years of service.

The Board of Examiners' objections to Judge Mansfield's conclusions are set forth in its letter to Judge Tyler dated February 4, 1974, a copy of which is attached hereto. Also attached for the Court's consideration is the defendant Board of Examiners' letter to Judge Mansfield of November 26, 1973. We will not burden the Court with a repetition of those arguments. However, we call this Appellate Court's attention to several matters which appear to have been lost in the consideration by Judge Mansfield and Judge Tyler.

1. Both Judge Mansfield and Judge Tyler have

asserted that continuation of the transfer provision during this interim period would, in the words of Judge Tyler " . . . perpetuate discrimination and seriously jeopardize the efficacy of previous orders of the Court." This conclusion is wrong both as a matter of fact and of law. The transfer provision was in existence at the time of Judge Mansfield's original preliminary injunction order dated September 17, 1971. That order said not one word about the transfer provision. In fact that provision continued to be enforced up until the time Judge Mansfield issued his decision of December 27, 1973. Thus, for a period of over 3 years during which the "discriminatory" licensing system was enjoined, it was not felt necessary by the plaintiffs or the Court to suspend the operation of the transfer provision of the agreement between the CSA and the Board of Education. Surely if the operation of the transfer provision effected such a discriminatory result, the plaintiffs would have sought an end to a procedure which they claim stems directly from the license system. The fact that no such relief was sought is a clear indication that no one believed the transfer provision operated in a discriminatory manner.

The plaintiffs should not be permitted to create such a concept of discrimination because the word "contract"was used in the drafting of paragraph VIII. This is particularly

true since the plaintiffs readily admit that the transfer provision was never discussed during the negotiation of that paragraph in the settlement agreement.

2. Both Judge Mansfield and Judge Tyler seem to be under the impression that some law will be violated if the transfer provision is permitted to continue. This is clearly erroneous. The transfer provision was not challenged at the outset of this case and is clearly permitted under Section 2000e - 2 (h) of Title VII (42 U.S.C.). That section clearly permits an employer to provide "different . . .privileges of employment pursuant to a bona fide seniority . . . system . . .". Even the language upon which Judge Mansfield relied is no longer applicable since the CSA contract has been changed. The current agreement no longer refers to "appointment in license" which was an euphemism for service in a position calling for a license. The current agreement eliminates any reference to licenses and makes it clear that transfer rights depend upon length of service, which is clearly the case in thousands of other collective bargaining agreements that have not been found to discriminate against anybody.

3. Both District Courts were under the impression that no "actings" would qualify for rights under the transfer provision. This is clearly erroneous. Chance and Mercado themselves will qualify in 1975, and we are advised that others are now eligible.

For the reasons set forth in this memorandum and the attached documents, we urge this Court to reverse the decision of the District Court and to find that the transfer provision of the collective bargaining agreement between the CSA and the Board of Education continues to be valid and binding.

Respectfully submitted,

KAYE, SCHOLER, FIERMAN, HAYS & HANDLER

BY: _____
S.Z. Cohen

Attorneys for defendant Board of Examiners
425 Park Avenue
New York, New York 10022
(212) 759-8400

KAYE, SCHOLER, FIERMAN, HAYS & HANDLER
425 PARK AVENUE NEW YORK, N.Y. 10022

(212) PLAZA 9-8400

November 26, 1973.

The Honorable Walter R. Mansfield
United States Court of Appeals
United States Courthouse
Foley Square
New York, New York 10007

Re: Chance et al v. Board of Examiners et al.

Dear Judge Mansfield:

At our conference on November 16, 1973, various arguments were made concerning the interpretation of the language of the Final Judgment in connection with the applicability of the transfer provisions of the agreement between the Board of Education and CSA. I understand that the additional submissions by Mrs. DuBois and Mr. Bernikow will deal further with that subject. Accordingly, in this letter I would like to focus your attention on the intentions of the parties in agreeing to the settlement.

Negotiations looking toward a settlement of this dispute took place over a period of almost 9 months. During this entire period the subject matter of transfers under the CSA agreement was never mentioned. We were not purporting to deal with the question of transfers within the system. Our discussion was directed toward the development of an interim system which would permit Community School Boards to make initial appointments of those who had not been licensed on an equal basis with those who were licensed. Our intention was that the license qua license should not give its holder a preference in such initial appointment, or priority over those who did not hold such a license.

The early drafts of the stipulation contained the words "Nothing in this Judgment or in any law, regulation or by-law shall be deemed to require that vacancies be filled by licensed personnel." The word "contract" was added late in the discussions when it was pointed out in a general way that there might also be

EXHIBIT A

some language in the CSA agreement which would condition the appointments under discussion on the holding of a license. We agreed that this would be contrary to our intention.

As the Board of Examiners' chief spokesman in negotiations, I was not aware of the existence of the transfer agreement until this current controversy arose. It certainly was not raised by plaintiffs. Nor did plaintiffs ever assert that the Board of Education could not continue to recognize contractual provisions which condition benefits on length of service. I assume that there are many features of that agreement which condition benefits on service. There was never any suggestion that such benefits must be withheld because a license was a past prerequisite to accumulation of such service.

My understanding of our stipulation (and subsequent Judgment) is that unlicensed personnel were to have the same chance at new job opportunities as licensed personnel. We never purported to prescribe or limit the manner in which supervisory personnel are moved around within the system after receiving an initial appointment.

In my view, transfers are dependent on seniority and not on the holding of a license. Accordingly, recognition of the transfer agreement is not proscribed by the Final Judgment. Indeed, it was plaintiffs who vigorously insisted on incorporating Circular 30 and its supplement by reference. That Circular clearly includes continued recognition of the transfer agreement.

Very truly yours,

S.Z. Cohen

SZC:cv

BY HAND

cc: Elizabeth B. DuBois, Esq.
Leonard Bernikow, Esq.
Harold Siegel, Esq. (Secretary of The Board of Education)

bcc: Dr. Murray Rockowitz
Howard Jacobson, Esq.

KAYE, SCHOLER, FIERMAN, HAYS & HANDLER
425 PARK AVENUE NEW YORK, N.Y. 10022

(212) PLAZA 9-8400

MILTON HANDLER
FREDERICK R. LIVINGSTON
STANLEY D. WAXBERG
MILTON KUNEN
JOSEPH G. CONNOLLY
SIDNEY J. SILBERMAN
FREDERICK GELBERG
STANLEY D. ROBINSON
FRED A. FREUND
STUART MARKS
SAUL DUFF KRONOVET
SAUL Z. COHEN
B. W. NIMKIN
WILLIAM J. ISAACSON
SHELDON OLIENSIS
FRED N. FISHMAN
FREDERICK H. BULLEN
GERALD FELLER
ARNOLD I. GOLDBERG
NORMAN SINRICH
DONEN GLEICK
JOSHUA F. GREENBERG
DAVID KLINGSBERG
MILTON J. SCHUBIN

PETER M. FISHBEIN
LAWRENCE NEWMAN
PETER H. WEIL
SEYMOUR GOLDSTEIN
DAVID GOLDBERG
MELVIN MICHAELSON
DONALD J. CURRIE
BERTRAM A. ABRAMS
JULIUS BERMAN
MICHAEL MALINA
JOEL B. ZWEIBEL
MARTIN S. SAIMAN
JOHN T. DUNNE
JOHN A. FRIEDMAN
SIDNEY KWESTEL
STANLEY ROSENBERG
JAY G. STRUM
ALLEN KEZSBOM
GERALD SOBEL
RONALD L. UNGER
ELIZABETH HEAD
HENRY K. UMAN
S. L. WARHAFTIG
JEFFREY M. EPSTEIN

STANLEY H. FULD
HAROLD L. FIERMAN
SPECIAL COUNSEL

JACOB SCHOLER
JAMES S. HAYS
NATHANIEL H. JACKSON
RICHARD C. FLESCH
JAY O. KRAMER
SIDNEY A. DIAMOND
COUNSEL

3, VILLA ÉMILE-BERGERAT
92523 NEUILLY (PARIS), FRANCE
TEL 637 95 00
PAUL CORIAT
JOSEPH DELATTRE

CABLE ADDRESSES
KAYEMACLER NEW YORK
KAYEMACLER NEUILLY/SEINE

TELEX NUMBERS
NEW YORK DOMESTIC 126921
NEW YORK INT'L 234860
PARIS LEFEBVRE 62971F

February 4, 1974.

Honorable Harold R. Tyler, Jr.
United States District Court
Southern District of New York
United States Courthouse
Foley Square
New York, New York 10007

Re: Chance et al v. Board of Examiners
et al., 70 Civ 4141

Dear Judge Tyler:

Pursuant to the Court's instructions of January 21, 1974, this letter is submitted on behalf of the Board of Examiners in support of CSA's motion for reconsideration of Judge Mansfield's opinion and order of December 27, 1973. The position of the Board of Examiners has been set forth in my letter of November 26, 1973 and affidavit dated January 21, 1974. However, several additional observations are in order, viz.:

1. Judge Mansfield made a serious error of fact and law when he said at page 8:

> ". . .we are satisfied that (the orders) prohibit the Board from entering into any contract which would have the effect of preferring licensed personnel, whether or not previously appointed to supervisory positions, over unlicensed personnel who are otherwise qualified under the terms of the Orders for appointment to fill a vacancy. To hold otherwise would be to sanction the very discrimination against which the Orders are directed."

First he was wrong in asserting that "licensed" personnel are preferred. The preference is based on seniority and not on the license. Furthermore, he was incorrectly advised by plaintiffs that there are no "actings" who would be

eligible. Had Mrs. Timson not retired, she would have been eligible. See Board of Education v. Nyquist, 31 N.Y. 2d, 468, 1973. I am advised that there are other "actings" who are now eligible and that beginning this month their numbers will start to mount significantly. (Chance and Mercado themselves will be eligible in 1975.)

Second, there is no legal impediment to giving a preference based on a bona fide seniority system. Section 2000e - 2 (h) of Title VII (42 U.S.C.) provides as follows:

> "(h) Notwithstanding any other provision of this subchapter, it shall not be an unlawful employment practice for an employer to apply different standards of compensation, or different terms, conditions, or privileges of employment pursuant to a bona fide seniority or merit system . . ."

The transfer provisions of the CSA agreement provide such a "privilege" "pursuant to a bona fide seniority . . . system." Judge Mansfield's original order of July 14, 1971 and subsequent order of September 17, 1971, recognized that these transfer provisions violated no Constitutional principle since they said not one word about the subject. Nor did plaintiffs seek to enjoin the operation of these provisions. During the entire time that the preliminary injunction was in effect, the transfer provisions were being enforced without a murmur from plaintiffs, despite the injunction's clear prohibition against a preference based on the holding of a license.

2. Judge Mansfield made a serious error in finding that Circular 30 was not incorporated by reference in the order. How could he, on the one hand, find that the word "contract" meant with specificity to prohibit the application of the CSA transfer provisions, and, on the other hand, ignore a specific written provision expressly incorporating the transfer provisions in Circular 30 (i.e., see supplement to Circular 30)? Judge Mansfield spoke approvingly of Circular 30 in 2 prior opinions; the order he signed is shot through with references to it. It is adopted as the basis for qualifying "actings"

and yet he concludes it was not incorporated by reference and the supplement was therefore inoperative. This conclusion clearly ignores the facts and controlling principles of law.

3. At page 8 of his opinion of December 27, Judge Mansfield paraphrases plaintiffs' position as being that these matters ". . .were discussed by the parties in negotiating the terms of the orders. . ." Plaintiffs, however, in their letter to Judge Mansfield of November 27, expressly concede that ". . . we did not discuss the union transfer provisions specifically . . ." They go on to argue that they knew about it and I should have known about it. To invalidate a long-standing provision of a collective bargaining agreement on the basis of plaintiffs' "hocus-pocus" while simultaneously ignoring a precise statement that Circular 30 incorporates the transfer provisions (which in fact have been honored under the preliminary injunction) demonstrates a clear misunderstanding of the facts.

4. Finally, Judge Mansfield was apparently impressed by what he calls a reversal of position by counsel for Board of Examiners. This alleged reversal he finds in comparing Mr. Jacobson's letter of October 22, 1973 with my letter of November 26, 1973. This question was not raised at the November 16th conference and in fact there is no inconsistency between the letters. While I was ill I spoke to Mrs. DuBois on the telephone and confirmed my view that the license (qua license) was not supposed to give one person a priority over another. I had no knowledge or understanding at that time about the seniority characteristics of the transfer provisions, had never seen the CSA agreement, and was not purporting to give an opinion on that point. Mr. Jacobson's letter, pursuant to my instructions, was very limited. It conceded that the word "contract" includes a collective bargaining agreement but it does not say one word about the transfer provisions.

If the transfer provisions operate discriminatorily why weren't they enjoined by the initial injunction? Why, after 3 1/2 years should a negotiated settlement be distorted to give a broader remedy than that plaintiffs had if no settlement had been reached? No reason indeed!

Plaintiffs argue that Judge Mansfield's opinion should not lightly be set aside. We agree. However, a collective bargaining agreement should not lightly be set aside either, particularly in a context where a party to the agreement was not

properly heard. Judge Mansfield did not have the benefit of sufficient argument and accordingly he did not gain a sufficient understanding of the facts and the significance of the action proposed by plaintiffs. His decision, if not modified, will cause serious disruption in the school system. Based upon the more extensive factual and legal presentation made to this Court, it is clear that the transfer provisions of the CSA agreement were not abrogated by the stipulation of settlement and the consent order entered thereunder.

Respectfully submitted,

S. Z. Cohen

SZC:cv

cc: Elizabeth DuBois, Esq.
Leonard Bernikow, Esq.
Leonard Greenwald, Esq.
Prof. George Cooper

bcc: Dr. Murray Rockowitz (5 copies)
Howard Jacobson